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OCT 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-540

IN THE

# Supreme Court of the United States

October Term, 1983

THOMAS WESTBROOK,

*Petitioner,*

and

HUTCHINSON CRANE EXCAVATING CO., INC.,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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## QUESTION PRESENTED

Whether plaintiffs can escape the six month limitation of § 933(b), Longshoremen's and Harbor Workers' Compensation Act, on the basis of a conflict of interest, where the same insurance carrier provided both compensation insurance and liability coverage.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Respondents respectfully request this Court to deny the petition for Writ of Certiorari to review the Judgment of the District of Columbia Court of Appeals (Appeal No. 82-1151) affirming the judgment of the District of Columbia, Civil Division, granting summary judgment to the Defendant Hutchinson Crane Excavating Co., Inc., and the Order of the District of Columbia Court of Appeals denying the Petition for Rehearing, or Suggestion for Rehearing and/or Suggestion for Rehearing En Banc.

## OPINIONS BELOW

The Superior Court for the District of Columbia Order of Summary Judgment, dated August 3, 1982, is unreported, but appears as Petitioner's Appendix A, pp.1a-5a. The opinion of the District of Columbia Court of Appeals, dated June 30, 1983, from which certiorari is sought, is unreported, but appears as Peitioner's Appendix B, pp.6a-10a. The order of the District of Columbia Court of Appeals, dismissing the Petition for Rehearing and/or Suggestion for Rehearing En Banc, dated July 26, 1983, is unreported, but appears as Petitioners Appendix C, pp.11a-12a.

## JURISDICTION

The Respondents do not controvert the Petition on the basis of timely filing.

## RELEVANT STATUTES

The relevant statutory provisions are as follows:
D.C. Code 36-501.
28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

Petitioner, Thomas Westbrook, was a carpenter employed by George Hyman Construction Company. He was injured on June 16, 1976, while working on a Washington Metropolitan Area Transit Authority site. He applied for and received compensation benefits pursuant to a formal award filed by the Deputy Commissioner on or about May 25, 1977. The case at bar was commenced on June 15, 1979, almost two years after the award.[1] The trial court granted summary judgment to the defendant below on August 3, 1982, holding that the plaintiff below's cause of action was barred by provisions of § 933(b).

The case was appealed to the District of Columbia Court of Appeals and the judgment affirmed on June 30, 1983. The then appellants' petition for Rehearing and/or Suggestion for Rehearing En Banc was denied on July 26, 1983.

At all relevant times the insurance carrier which provided Workmen's Compensation insurance coverage for the petitioner's employer and the insurance carrier which provided the liability insurance for the respondent were the same.

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[1] This petitioner brought his action against Hutchinson Crane Excavating Co., Inc., an entity that had rented a crane and operator to the petitioner's employer.

The petitioner also petitioned this court for certiorari in the case of *George Phillippi v. Bechtel Associates Professional Corp., et al.,* (October 1982 term). The arguments presented therein were that the petitioner's third party action should not be barred because Washington Metropolitan Area Transit Authority's Coordinated Insurance Program resulted in a conflict of interest. Certiorari was denied on October 3, 1983.

## ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THE REASONS GIVEN IN SUPPORT OF THE ARGUMENT ARE ESSENTIALLY THE SAME AS *GEORGE PHILLIPI, ET AL. V. BECHTEL ASSOCIATES PROFESSIONAL CORP., D.C., ET AL.,* (October 1982 term) IN WHICH CERTIORARI WAS DENIED.

The manner in which the argument is set forth differs slightly between the two cases. In the present petition the petitioner draws words, phrases and sentences from the decision of the United States Court of Appeals, District of Columbia Circuit (Appeal No. 82-2017) *Paul D. Johnson, Appellant, v. Bechtel Associates Professional Corp., D.C. et al,* to buttress an argument that there was confusion as to who the proper defendant was. However, the substance of the argument is identical. Thus the reasons given for petitioning for certiorari are identical to those previously offered and found insufficient.

II. THERE ARE NO SPECIAL OR IMPORTANT REASONS COMPELLING THE GRANTING OF CERTIORARI.

Rule 17, Rules of the Supreme Court of the United States sets forth the character of reasons to be considered in granting certiorari and suggests that review will be granted only where there are special and important reasons therefor.

The Respondent suggests that there are no such reasons offered in support of the petition.

There is no conflict between the decision of the court below and other courts either Federal or State.

The holding does not conflict with any applicable decision of this court.

The court below has not decided any important question of Federal law.

III. AN EMPLOYEE MAY NOT PROSECUTE A PERSONAL INJURY ACTION AGAINST A THIRD PARTY AFTER HIS RIGHT TO DO SO HAS BEEN ASSIGNED TO HIS EMPLOYER PURSUANT TO § 933(b) OF THE ACT.

The petitioner offers arguments that are based on facts that are not of record in an attempt to create a viable conflict of interest situation that might allow the exception set out in *Czaplicki v. The S. S. Hoegh Silvercloud*, 351 U.S. 525 (1956), to become applicable to the present case. The difficulties stemming from this approach transcend the pure legal objections. The result is a collection of purely conclusory statements that are without an evidentiary predicate which cannot be factually met by the respondent without the respondent also going beyond the record. Further, even if the statements were correct they would not serve to excuse the petitioner's failure to bring his suit within the six-month period required.

The petitioner cites *Johnson v. Bechtel Associates Professional Corp., D.C., et al.* to urge that WMATA's Coordinated Insurance Program is designed to circumvent the statutory purpose of the Longshoremen's Act, that it obscures the rights and remedies of the injured worker, and that it subverts the Congressional intent. The argument also urges that it allows the Washington Metropolitan Area Transit Authority, a potential third party defendant, to claim immunity as a result of its purchase of Workmens Compensation insurance. WMATA pursued this position through summary judgment in the United States District Court and the issue went to the United States Court of Appeals for the District of Columbia. At the appellate level, WMATA lost and the argument was rejected. This defense was not raised until the summer of 1982. In making this statement the respondent acknowledges that the affirmative statement is not truly of record, but it illustrates the difficulty inherent in attempting to respond to statements that are not of record. Its import is obvious because petitioner could not have

been confused by WMATA's position at the time the six-month period expired.

The important point, however, is of record. The petitioner did know who to sue as a third party. He did, in fact, sue the appropriate entity. Unfortunately, the petitioner sued that entity too late.

To suggest that all this was caused by a *Czaplicki* type of conflict or confusion affronts both logic and the facts before the court. It may be that WMATA is now attempting to claim immunity by virtue of paying for the compensation insurance, but WMATA was never made a defendant in this case. Insofar as the bar of the Workmens Compensation Act is concerned, the petitioner sued an appropriate defendant. He made the wrong judgment as to when to sue that defendant. It may be that in point of fact reliance was placed on *Potomac Electric Power Co. v. Wynn*, 343 F.2d 295 (D.C.Cir.1965). It would seem, however, that reliance on *Wynn* was always dangerous in view of the clear and unequivocal wording of the Act. This court in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 595 (1981) concluded that the *Wynn* decision was a case to be avoided rather than embraced. In the body of the opinion, the Court stated: "For reasons already stated, we are satisfied that that opinion (*Wynn*) did not correctly construe the 1959 amendments."

Indeed, *Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956), together with the provisions of the Act as they existed prior to 1959 created a milieu in which a conflict of interest situation such as is created by a single insurer for both compensation and liability could diminish or destroy the rights of an employee. The problems created by that situation gave

birth to *Czaplicki, supra.* However, those very same problems also gave birth to the 1959 and 1972 amendments. The effect of those amendments was not to eliminate conflicts or potential conflicts created, but rather to cure the problem which the conflicts created. The petitioner has created an argument that has as its predicate the concept that if one can demonstrate that *Rodriguez, supra,* did not strike down *Czaplicki, supra,* and that WMATA's Coordinated Insurance Program necessarily creates a conflict, then the impact of 933(b) can be avoided. The defect in this reasoning stems from the fact that the 1959 and 1972 amendments corrected the problem which arises from the existence of the conflict and thus, the existence of a real or possible conflict is unimportant. The employee is given an absolute right to bring his own suit, albeit limited as to time.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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